

## DEFERENCE TO AUTHORITY AS A BASIS FOR MANAGING IDEOLOGICAL CONFLICT

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### I. BACKGROUND

When we examine political or legal institutions, one key criterion of their effectiveness is their ability to manage problems or disagreement within the communities over which they exercise authority. This is equally true of political institutions, such as the United States Congress, and legal authorities, like the United States Supreme Court. Each struggles with gaining public support for its authority to make decisions within a particular arena, as well as with gaining public support for particular policies.

Ideally, authorities are able to manage disagreements by changing people's understanding of the facts underlying some value-based policy. For example, an institution might lead people to believe that climate change is real, and because of that changed belief motivate people to change their attitudes and values and, as a result, their policy positions. Trying to change beliefs, values and attitudes are difficult objectives because prior beliefs, attitudes and values shape people's understanding of new information, assimilating it into prior frameworks and rejecting information that is too discrepant. As a consequence, people are most likely to be receptive to information that supports their prior understanding of the facts, as well as their prior attitudes and values. Social-science research supports the argument that belief, attitude and value change is difficult, especially when people view the world through value-based frameworks as fundamentally different as those

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discussed by Dan Kahan.<sup>1</sup> As he notes, in value-centered arenas, such as climate change, people often respond to information inconsistent with their prior attitudes and values by disparaging the source and the message.<sup>2</sup>

The idea of reaching a consensus about important public policy issues is central to models of deliberative democracy.<sup>3</sup> That work suggests that groups can rationally discuss issues and reach some common view about facts and values.<sup>4</sup> It is unclear, however, whether such consensus is actually possible when highly contentious issues, such as climate change, are involved. It is further unclear whether consensus is a desirable normative goal. In pluralistic societies the underlying assumption is that people differ in their values, and that such diversity in values is part of a pluralistic democratic state. As a result, the goal of governance should be to reach policy positions that are acceptable to a broad segment of the population, although not necessarily consistent with people's personal values and policy preferences.

The problems associated with achieving fact and value consensus raise the question of the degree to which it is necessary to have agreement about facts and values for society to function effectively. This issue is widely discussed in the context of multiculturalism,<sup>5</sup> with commentators opining that America cannot exist if commonly held values are not widespread in the population. As Kahan shows, this question has been extended into the modern era through discussions of conflicts over value laden issues, like climate change, and in disputes about the facts used by different factions to advance their value based positions.<sup>6</sup> The issue has been, and is today, a question of the degree to which agreement about facts or consensus about values, or both, is necessary for authorities to be effective in managing disputes.

The argument tested in this paper is that authorities can also manage conflict in a different way. They can build their legitimacy as appropriate societal authorities and through their legitimacy influence people's view that they have an obligation to defer to the decisions of

1. See Dan M. Kahan, *The Supreme Court 2010 Term—Forward: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 19-31 (2011).

2. See *id.* at 25.

3. See Jürgen Habermas, *Reason and the Rationalization of Society*, in 1 THE THEORY OF COMMUNICATIVE ACTIONS 3 (Thomas McCarthy trans., 1981).

4. JAMES S. FISHKIN, WHEN THE PEOPLE SPEAK: DELIBERATIVE DEMOCRACY AND PUBLIC CONSULTATION 194 (2009).

5. See generally A. SCHLESINGER, THE DISUNITING OF AMERICA: REFLECTIONS ON A MULTICULTURAL SOCIETY (1991).

6. See generally Kahan, *supra* note 1.

duly constituted authorities.<sup>7</sup> This legitimacy-based approach focuses upon gaining deference, rather than changing people's understanding of the factors or their attitudes and values. It is consistent with a long-standing American tradition of deference to a private sphere in which people can hold religious and moral values that differ, but with a shared allegiance of deferring to political and legal authorities.

Successful leaders and institutions have a long history of striving to build legitimacy and through it, to win the consent of the governed. They do so with the goal that their commands will be voluntarily obeyed by the public, even though the public does not necessarily agree with them or view them as consistent with their private moral values or preferred policies.<sup>8</sup> As Herbert Kelman puts it: "It is essential to the effective functioning of the nation-state that the basic tenets of its ideology be widely accepted within the population . . . . This means that the average citizen is prepared to meet the expectations of the citizen role and to comply with the demands that the state makes upon him, even when this requires considerable personal sacrifice."<sup>9</sup> Legitimacy, according to this general view, is a quality that is possessed by an authority, a law, or an institution that leads others to feel obligated to accept its directives. It is, in other words, "a quality attributed to a regime by a population."<sup>10</sup> The roots of the modern discussion of legitimacy are usually traced to the important writings of Max Weber on authority and the social dynamics of authority.<sup>11</sup>

Weber argues that the ability to issue commands that will be obeyed does not rest solely upon the possession and ability to use power.<sup>12</sup> In addition, there are rules that people will voluntarily obey, and authorities whose directives will be voluntarily followed. Legitimacy, therefore, is a quality possessed by an authority, a law, or an institution that leads others to feel obligated to obey its decisions and directives. This feeling of responsibility reflects a willingness to suspend personal considerations of self-interest and to ignore personal

7. See generally Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. OF PSYCHOL. 375 (2006).

8. TOM. R. TYLER, WHY PEOPLE OBEY THE LAW 3-4 (2006).

9. Herbert C. Kelman, *Patterns of Personal Involvement in the National System: A Social Psychological Analysis of Political Legitimacy*, in INTERNATIONAL POLITICS AND FOREIGN POLICY 276, 278 (James N. Rosenau ed., 1969).

10. Richard M. Merelman, *Learning and Legitimacy*, 60 AM. POL. SCI. REV. 548 (1966).

11. See generally MAX WEBER, *ECONOMY AND SOCIETY* (Guenther Roth & Clause Wittich, eds., 1968).

12. *Id.*

moral values because a person thinks that an authority or a rule is entitled to determine appropriate behavior within a given situation.

Kelman & Hamilton refer to legitimacy as "authorization" to reflect the idea that a person authorizes an authority to determine appropriate behavior within some situation, and then feels obligated to follow the directives or rules that authority establishes.<sup>13</sup> As they indicate, the authorization of actions by authorities "seem[s] to carry automatic justification for them. Behaviorally, authorization obviates the necessity of making judgments or choices. Not only do normal moral principles become inoperative, but—particularly when the actions are explicitly ordered—a different type of morality, linked to the duty to obey superior orders, tends to take over."<sup>14</sup>

One way to think about legitimacy is as a property of an institution. For example, studies of confidence in government ask people to rate the overall government, and its institutions and authorities. Studies of the legitimacy of legal authorities similarly ask people to evaluate their general feelings of responsibility and obligation to obey the law and legal authorities. This focus on the importance of legitimacy reflects concern with the circumstances under which people follow the directives of social rules and social authorities. Legitimacy is important to the success of such authorities because it allows them to gain public deference to a range of decisions by virtue of their social role. This deference is not unlimited, since legitimacy may exist within a certain sphere, but within that sphere, acceptance of the right of authorities to make decisions that ought to be accepted and obeyed is broad.<sup>15</sup>

There is a considerable amount of research suggesting both that legitimacy leads to deference in the face of disagreement and that this mechanism is distinct from attitude or belief change. Consider one example relevant to the topic of the United States Supreme Court. Tom Tyler and Gregory Mitchell examined people's willingness to defer to *Rowe v. Wade*.<sup>16</sup> They found that there was considerable willingness to defer to that decision, even among those who morally opposed abortion.<sup>17</sup> The key to such deference was viewing the Court as a legitimate institution. On the other hand, Tyler and Mitchell found that legitimacy

13. See HERBERT C. KELMAN & V. LEE HAMILTON, *CRIMES OF OBEDIENCE: TOWARD A SOCIAL PSYCHOLOGY OF AUTHORITY AND RESPONSIBILITY* 77-78 (1989).

14. *Id.* at 16.

15. Tyler, *supra* note 7, at 385.

16. See Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 *DUKE L.J.* 735-65 (1994).

17. *Id.* at 756-60.

was distinct from value or belief change. People still felt that abortion was morally wrong—their beliefs and values did not change. But, they viewed deferring to the Court as their responsibility. Hence, legitimacy is a potentially effective mechanism in the case of fundamental value based disputes. From this perspective, legitimacy is a highly desirable feature of social systems.<sup>18</sup>

The legitimacy argument has advanced considerably in the last decade, as it has been shown that there are ways to build and maintain legitimacy that are distinct from providing people with decisions that they want or agree with. Legitimacy can be built through procedural fairness. Our suggestion is that authorities can gain a great deal of legitimacy when they follow clear norms of procedural justice, including impartiality, transparency, respect for human dignity, and consideration of peoples' views, concerns, and needs. Thus, implementing fair procedures, as well as providing favorable and/or fair outcomes, can provide a solid basis for establishing system legitimacy.

The legitimacy of authorities is an especially promising basis for the rule of law because noted research suggests that it is not yoked to agreement with the decisions rendered by legal authorities. If people view as legitimate only those authorities that make decisions they agree with, it would be difficult for legal authorities to maintain their legitimacy, insofar as they are required to make unpopular decisions and to deliver unfavorable outcomes. In times of war, for example, people must be willing to be drafted and serve in the armed forces. In times of scarcity they must accept diminished economic outcomes. And when contentious social issues are involved they may have to accept policies that they disagree with or even feel are morally wrong.

The procedural basis of legitimacy is especially strong with respect to public opinion concerning political and legal institutions. Studies of the Presidency<sup>19</sup>, the legislature<sup>20</sup>, and the Supreme Court<sup>21</sup> all suggest that when citizens are evaluating government institutions,

18. See TOM R. TYLER & YUEN J. HUO, *TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS* (2002).

19. See generally Tom R. Tyler, Kenneth A. Rasinski & Kathleen M. McGraw, *The Influence of Perceived Injustice on Support for Political Authorities*, 15 J. APPLIED SOC. PSYCH. 700 (1985).

20. See generally Amy Gangl, *Procedural Justice Theory and Evaluations of the Lawmaking Process*, 25 POL. BEHAV. 119 (2003); J.R. HIBBING & ELIZABETH THEISS-MORSE, *CONGRESS AS PUBLIC ENEMY: PUBLIC ATTITUDES TOWARD AMERICAN POLITICAL INSTITUTIONS* (1995); J.R. HIBBING & ELIZABETH THEISS-MORSE, *STEALTH DEMOCRACY: AMERICANS' BELIEFS ABOUT HOW GOVERNMENT SHOULD WORK* (2002).

21. Mark D. Ramirez, *Procedural Perceptions and Support for the US Supreme Court*, 29 POL. PSYCHOL. 675 (2008); Tyler & Mitchell, *supra* note 16, at 790.

they focus primarily on the fairness of the procedures by which the institutions make policies and implement decisions. Research on work organizations also suggest that perceived legitimacy has a strong procedural basis.<sup>22</sup>

The procedural basis of legitimacy on an institutional level is consistent with the argument that support for the rules of governance (i.e., procedures and institutions) is theoretically and empirically distinguishable from support for particular individuals or their policies. Studies suggest that reactions to individual leaders and policies are more strongly linked to outcome desirability than are reactions to institutions.<sup>23</sup> In general, however, it is support for the rules of governmental operation—what Easton refers to as “diffuse system support”<sup>24</sup>—that is seen as crucial to long-term governmental stability.

Our thesis is that the most reliable way of attaining legitimacy and maintaining diffuse system support for legal institutions and authorities is by establishing and protecting procedural safeguards. Indeed, the need for procedural safeguards is one of the strongest arguments for the Constitutional separation of executive, legislative, and judicial branches of government. To the extent that procedures for insuring genuine fairness are compromised, the system will begin to lose legitimacy and—over time—fail to inspire the kind of cooperation and deference that is often taken for granted during periods of stability.

The distinctness of decision-making procedures from their outcomes, and the ability of people to recognize and respond to that distinction, is a basis for managing contentious public policy issues. What is particularly striking about procedural justice judgments is that they shape the reactions of those who are on the losing side of cases. If the person who does not receive an outcome that they think is favorable or fair feels that the outcome was arrived at in a fair way, they are more likely to accept it. And, studies conducted over time show that people continue to adhere to fairly arrived at decisions over time, suggesting that their acceptance of those decisions is genuine and not simply the

22. Kimberly D. Elsbach, *The Architecture of Legitimacy*, in *THE PSYCHOLOGY OF LEGITIMACY* 391 (John T. Jost & Brenda Major eds., 2001); TOM R. TYLER & STEVEN L. BLADER, *COOPERATION IN GROUPS: PROCEDURAL JUSTICE, SOCIAL IDENTITY, AND BEHAVIORAL ENGAGEMENT* (2000); Tom R. Tyler & Steven L. Blader, *Can Businesses Effectively Regulate Employee Conduct? The Antecedents of Rule Following in Work Settings*, 48 *ACAD. OF MGMT. J.* 1143 (2005).

23. See Kenneth Rasinski, Tom R. Tyler & Kim Fridkin, *Exploring the Function of Legitimacy: Mediating Effects of Personal and Institutional Legitimacy on Leadership Endorsement and System Support*, 49 *J. PERS. & SOC. PSYCHOL.* 386-94 (1985).

24. DAVID EASTON, *A SYSTEMS ANALYSIS OF POLITICAL LIFE* 444 (1965).

result of fear or coercion.<sup>25</sup> Further, people who experience procedural justice in court rate the courts and the court personnel more favorably, indicating higher levels of trust and confidence in the courts and the court system.

The key point about procedures is that they shift the focus from the policies or outcomes at issue to the fairness of the procedure. While it is often not possible to give everyone an outcome that is consistent with their sense of what is appropriate, it is possible for everyone to experience a fair procedure. This includes feeling that decisions are being fairly made, believing that their concerns are being respected, and believing that their values are taken into account.<sup>26</sup>

## II. THE MEANING OF PROCEDURAL JUSTICE

A great deal has been written about the meaning of fair procedures to people who are evaluating legal or political authorities. The broad procedural justice framework includes a set of issues that are potentially important in evaluating the fairness of a procedure. These include whether people have opportunities for input (voice); whether decisions are made in a neutral and transparent way, through consistent and fact-based rule application (neutrality); whether people and their rights are respected (respect); and, whether authorities are viewed as sincere and benevolently motivated when making decisions (motive based trust).<sup>27</sup>

A recent study of public views about the United States Supreme Court (hereafter USSC) was conducted by James Gibson and Gregory Caldeira.<sup>28</sup> They found little support for a mechanical jurisprudence model in which justices were viewed as simply applying laws when making decisions. Rather, people view the Court as acting with discretion.<sup>29</sup> The results of their survey indicated that the public's reactions depend upon how such discretion is exercised.

The Gibson study distinguishes two images of discretion: one based upon principles and sincerity and the other based upon the stra-

25. Dean G. Pruitt, Robert S. Peirce, Neal B. McGillicuddy, Gary L. Welton & Lynn M. Castriano, *Long-Term Success in Mediation*, 17 LAW & HUM. BEHAV. 313, 313-30 (1993).

26. Tom R. Tyler & E. Ailan Lind, *A Relational Model of Authority in Groups*, in 25 *Advances in Experimental Social Psychology* 115 (Mark P. Zanna ed., 1992).

27. Steven Blader & Tom R. Tyler, *A Four Component Model of Procedural Justice: Defining the Meaning of "Fair" Process*, 29 PERSON. & SOC. PSYCHOL. BULL. 747-58 (2003).

28. James L. Gibson & Gregory A. Caldeira, *Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court?*, 45 LAW & SOC'Y REV. 1, 195-219 (2011).

29. *Id.* at 207.

tegic expression of self-interest. The public's belief that justices are acting upon principles and acting sincerely (being "judicious") is central to their legitimacy. Gibson and Caldeira note that this is similar to earlier findings about Congress, where studies suggested that the belief that legislators act out of personal self-interest is key to the low legitimacy of Congress.<sup>30</sup> While this finding is provocative, it is unclear from the discussion what acting sincerely means.

A second recent study is that of Dan Kahan.<sup>31</sup> His analysis suggests two ways that courts can communicate decisions so as to lessen threat to cultural groups. These methods give a sense of what sincere means to the public. He first suggests the idea of "aporia," a demonstration by the Court that it gives fair and open-minded consideration to the arguments presented by the various parties involved.<sup>32</sup> The Court needs to show that it carefully "scrutinized the record"<sup>33</sup> by paying attention to all sides of the argument. Second, Kahan suggests the idea of affirmation.<sup>34</sup> He argues that the court needs to acknowledge the various values underlying the positions articulated by different groups, showing respect for the values they reflect. In other words, the Court needs to display "idioms and gestures that display cultural plurality."<sup>35</sup>

Drawing upon these approaches, this paper compares three models of how decisions are understood by the public. Kahan focuses upon what the justices should do, while this paper will focus on the other side of the equation: what members of the public should feel about the court in order to conclude that fair procedures have occurred, that decisions are legitimate, and that they should defer to those decisions.

One way of thinking about what the public is concerned about is the legal model in which decision makers make decisions, which are consistent with legal principles. This idea is presented by Gibson and Caldeira as the mechanical jurisprudence model of Court decision-making.<sup>36</sup>

A second model involves the degree to which the Court considers the needs and concerns of the people affected by a decision. To understand this model, it is important to consider the focus of studies of

30. HIBBING & THEISS-MORSE (1995), *supra* note 20; HIBBING & THEISS-MORSE (2002), *supra* note 20.

31. See Kahan, *supra* note 1, at 58-71.

32. *Id.* at 59-66.

33. *Id.* at 67.

34. *Id.* at 67-71.

35. *Id.* at 71.

36. Gibson & Caldeira, *supra* note 28, at 213-14.



trust in government.<sup>37</sup> People are typically asked whether political leaders are too influenced by “special interests,” such that they disregard the needs of the people.<sup>38</sup> The contrasting view is that leaders make their decisions after considering the needs of the people in their community. Finally, does the Court respect people’s values? The alternative to respecting people’s values is making decisions based upon the justice’s own ideology and political views.

While consideration of public concerns and making decisions consistent with public values are both more directly linked to the connection between authorities and the community than making decisions based upon the law, they are not the same. In particular, consideration of public views is an issue of trust in authorities. People have no direct way of observing whether their views are considered, so they make an inference about the character of the decision maker—whether they are concerned about public needs.<sup>39</sup> In contrast, making a decision consistent with public values is something that the public can directly evaluate by comparing the decision to their values.

Trust is an element of discretion—a decision to infer that authorities are exercising their authority in a benevolent and sincere way—while a comparison of decisions made to public values reflects a view that formal law does not necessarily reflect those values, so people want to understand whether in fact their values are represented in the actions of the authority. From the perspective of an authority, discretion has more flexibility, so consideration is the most desirable way to have one’s actions judged.

#### A. Summary

Overall, two arguments are made and tested. The first is that legitimacy—conceptualized as the perception that decisions made fairly are appropriate and the perceived obligation to defer to those decisions—flows from procedural justice judgments, in addition to any influences of their favorability or un-favorability. The second is that people have a conception of procedural justice that extends beyond the traditional focus of attention: whether justices correctly apply the law.

37. See Margaret Levis & Laura Stoker, *Political Trust and Trustworthiness*, 3 ANN. REV. OF POL. SCI. 475, 475-507 (2000).

38. Stephen J. Farnsworth, *Congress and Citizen Discontent*, 31 AM. POL. RES. 66, 68 (2003).

39. See Tyler & Huo, *supra* note 18, at 97-99.

### B. Method

Respondents responded to hypothetical instances of decision making by either the United States Supreme Court or the United States Congress.<sup>40</sup> In each case, the participant was presented with an issue of self-identified high or low moral/economic significance. They were asked to consider that a decision about that issue was made by one of two decision-making bodies. That decision either favored or opposed their previously stated position.

Before they were asked questions about a particular decision, respondents were given a list of twenty-one issues and were asked to identify important and unimportant issues.<sup>41</sup> These rankings were used to identify issues of high and low importance to each respondent. Such ratings were made for ethical/moral issues and for economic issues.

The study had five factors that were varied randomly across the respondents: (1) whether the issue was high/low in importance; (2) whether the issue was moral or economic; (3) whether Congress or the Supreme Court was the decision making authority; (4) whether the questions about how the decision was made focused upon procedural fairness or procedural unfairness; and (5) whether the decision was favorable or unfavorable to their position.

Each participant was asked to consider a decision made by one of the government institutions about an issue. They were first told that the decision favored or opposed their own views and then asked to rate how fairly they thought that decision was made. They were then asked about their willingness to accept the decision.

### C. Sample

The sample consisted of 256 residents of the United States who completed the study for compensation. The participants were recruited via Mechanical Turk and they completed the questionnaire on the internet via Qualtrics.

40. While these two institutions may be evaluated in the same way, there are also suggestions that they may be viewed differently. See Margit Tavits, *Principle vs. Pragmatism: Policy Shifts and Political Competition*, 51 AM. J. OF POL. SCI. 151, 151 (2007).

41. The listed issues were: the environment, health care, war, terrorism, torture, gay marriage, national security, taxes, abortion, stem cell research, foreign trade, capital punishment, prayer in schools, immigration policy, gun control, space exploration, affirmative action, international diplomacy, education policy, social security, and religious values in society.

#### *D. Questionnaire*

Participants were asked to evaluate either the Supreme Court or Congress. Participants were asked a set of questions which tested their willingness to accept the decision they had read. These questions focused on two issues: (1) viewing the decision as appropriate, and (2) expressing willingness to defer to it. These two judgments were used to construct an overall acceptance scale.<sup>42</sup> The following questions were used to evaluate different outcome variables:

- **Appropriateness.** Two items were used: (1) "Was this a fair decision?"; and (2) "Was this decision appropriate?".
- **Acceptance.** Four items were used: (1) "How willing would you be to accept the results of this decision?"; (2) "To what extent do you approve of this decision?"; (3) "How willing would you be to comply with what was decided?"; and (4) "How willing would you be to allow this institution to make final decisions about policies in this area?".
- **Procedural justice judgments.** Respondents were also asked questions about different aspects of the fairness of the procedure they thought the agency used.
- **Principled decision-making.** Respondents were asked if the decision was "consistent with relevant regulations and laws."
- **Consideration of people's concerns.** Respondents were asked whether they believed that "citizen's concerns were given adequate consideration in the decision."
- **Respect for public values.** Respondents were asked the degree to which the decision "reflected the ethical values of the public affected by it."

42. The overall internal reliability for this scale was  $\alpha = 0.90$ .

### *E. Demographics*

The study also measured education, income, and self-reported liberalism. Within the sample, 44% of respondents had less than a B.A.; 38% had a B.A.; and 18% had advanced degrees. The sample's annual family income levels were 22% under \$25,000 annual family income, 34% with annual family income between \$25,000 and \$50,000, 35% with annual family income \$50,000 to \$100,000, and 9% with annual family income over \$100,000. Finally, based upon their positions about economic and social issues, 43% of the sample was classified as conservative and 57% as liberals based upon their positions about economic and social issues.

## III. FINDINGS

When people evaluated the fairness of the decision maker, they already knew that the decision made by the authority was opposed to or in favor of their own position. Hence, any influences of the fairness of the procedure were especially striking because respondents were making them in the shadow of a decision that they already knew favored or opposed their own values. The design of the study was therefore stacked against finding procedural justice influences because the outcome was already known. Normally, authorities try to place procedures prior to the decision so that support for their legitimacy is created through the fairness of the procedure, and that support then cushions them against an unfavorable or undesired decision.

The first important question is whether the perceived procedural justice of the procedure through which the respondents believed the institution made the decision influenced their acceptance of that decision. The crucial point is that this study looks at the willingness to defer to decisions, not beliefs or attitude changes. As noted, prior studies, such as Tyler & Mitchell, examined the willingness to defer to decisions made by the Supreme Court about abortion, finding considerable willingness that flowed from the view that the Supreme Court made its decisions using fair procedures.<sup>43</sup> However, Tyler & Mitchell did not find evidence of attitude change.

Regression analysis was used to examine the influence of procedural justice judgments<sup>44</sup> upon the willingness to defer. The results of

43. Tyler & Mitchell, *supra* note 16, at 738.

44. Either principled, adequate consideration of concerns, or respect for values.

that analysis are shown in Table 1. The numbers shown are beta weights, which reflect the relative influence of each factor. Influences that are significantly different than zero are starred.<sup>45</sup> The overall adjusted square of the multiple correlation coefficient indicates how much of the variance in willingness to defer is explained by all of the factors in the equation considered at one time.

The results shown in Table 1 first indicate that, as expected, people's willingness to accept decisions was shaped by their favorability (beta = 0.35). In addition, a comparison of the two equations shown indicated that the procedural justice elements explained additional variance, raising the variance explained from 39% to 66%. Further, each of the three procedural justice elements had a distinct influence. The procedure was evaluated as being more fair if (a) judges were viewed as principled followers of the law (beta = 0.12); (b) if judges were seen as giving adequate consideration to citizen needs and concerns (beta = 0.35); and, (c) if judges were judged to make decisions which were consistent with public values (beta = 0.18).

The results also suggest that the experimental variations had little direct influence upon the respondent's judgments. Further, variations in education, income, and conservatism had only a minor influence. The two effects found were a lesser willingness to accept decisions made by Congress and a tendency for the better educated to be more willing to defer to political and legal authorities.

These findings support the argument that deference is more strongly linked to procedures than it is to outcomes.<sup>46</sup> Hence, they support the suggestion that political and legal institutions can encourage deference through their actions. By making decisions in ways that the public views as fair, the Court can enhance its legitimacy.

On the other hand, these findings point to a different image of which procedural elements are important than is reflected in past discussions of the importance of neutrality and rule following.<sup>47</sup> It is important for the Court to make decisions in ways that follow the law. However, it is also important that the public views the justices as giving adequate consideration to their concerns and as making decisions that reflect public values.

45. \* $p < .05$ ; \*\* $p < .01$ ; \*\*\* $p < .001$ .

46. To illustrate this point, if outcomes are not considered, but procedures are, 56% of the variance in deference is explained. On the other hand, column one shows that only 39% of the variance is explained when only outcomes are considered.

47. Tyler & Mitchell, *supra* note 16, at 773-78.

These latter findings point to the need for the Court to address public concerns in reporting its decisions. Kahan's discussion of the Court emphasizes the need for the justices to indicate that they have considered public concerns and to demonstrate a respect for public values.<sup>48</sup> That argument is very much consistent with the findings reported here, which focus on what the public needs to feel about the Court. If the justices address the concerns noted by Kahan, they are more likely to create the impressions this study finds are linked to public views that they are acting via procedural justice.

In thinking about this argument, it is important to contrast it to a view focused upon whether the justices are following the law. If a concern about public support leads to changes that focus upon issues such as transparency, then changes will be based upon the assumption that the public simply needs to know more about what the Court is doing, i.e. needs more openness. These findings suggest that this is a misplaced emphasis. While openness is important, it is more important to focus on what the Court is being open about.

What does the public want to know? First, consider the view that distrust is linked to the belief that authorities do not consider the views, needs, and concerns of average people, which underlie discussions of trust in government.<sup>49</sup> To counter this view, decisions need to make clear that public concerns were considered by explaining how the decision was made. It is not enough to open up the process by being transparent, the process needs to be explained with reference to the way that decision makers were attentive to the concerns of the public.

Similarly, the belief that authorities act based upon their own ideologies and political preferences must be addressed by providing evidence about how public values were engaged during the decision making process. Kahan notes that decisions might affirm the importance of the various public values at issue when making decisions.<sup>50</sup> In other words, the justices should account for their decisions in ways that show appreciation for, and consideration of, public ethical concerns. The key is not simply to be transparent—so that people can see how decisions are being made—but to account for decisions in ways that address public concerns.

48. Kahan, *supra* note 1, at 59-66.

49. In public opinion polls, this openness is often contrasted to paying too much attention to special interests or big corporations.

50. Kahan, *supra* note 1, at 59-66.

It is also important to ask whether the background of the current justices is related to the nature of the opinions they write. Currently, the Court is composed of people with a background as judges. Hence, a focus on disputes over principles of law is natural. However, a broader conception of the role of the Court could include a greater effort to articulate the way in which the public's needs, concerns and values are being considered during Court decision-making. This is a more natural focus for people whose background includes involvement in politics, as is true of the members of Congress. However, these findings support the value of such an expanded view of the purpose of the Court's decisions.

#### *A. Does Winning Matter?*

The respondents evaluated the Supreme Court/Congress after they were told to imagine that the institution had opposed or favored their own position on the issue under consideration. Did the nature of the outcome matter? To address this question the analysis shown in Table 1 was replicated separately for those in the favorable and unfavorable outcome conditions. That analysis is shown in Table 2. It indicated that those respondents who were reacting to favorable decisions focused more heavily upon their inferences about whether their views were considered. When outcomes were unfavorable, respondents were concerned about both whether their concerns were considered and whether the decisions were consistent with their values.

#### *B. What is the Range of Procedural Justice Influences?*

To examine the range of procedural justice influences the respondents were divided into groups based upon whether or not the issue they considered was moral or economic and was an issue of high or low self-rated importance. The results of the regression analyses among these subgroups are shown in Table 3. They indicated that respondents always focused upon procedural justice issues. However, the particular issues they were concerned about changed, depending upon the issue. In the case of moral issues, high importance led to more attention to procedural justice issues, with both consideration of views and respect for values becoming important. With economic issues, high importance led to greater attention toward outcome favorability. However, in all cases, respondents independently cared about the justice of the procedure.

### C. *An Era of Mistrust?*

Finally, it has been noted that there is a strong current of institutional distrust within America today, at least as far as national level institutions are concerned. For example, recent Gallup polls indicate that 66% of Americans expressed “a great deal/fair amount” of trust in the Supreme Court in 1973, and 67% in 2012.<sup>51</sup> During the same period, trust in Congress went from 70% to 31%, and trust in the executive branch of government from 73% to 56%.<sup>52</sup>

In this study, the respondents indicated less willingness to accept and defer to decisions made by Congress, consistent with its generally lower trust and confidence ratings.<sup>53</sup> And, of course, respondents were less willing to accept and defer to unfavorable decisions.<sup>54</sup> The respondents were particularly unwilling to defer to unfavorable decisions made by Congress.<sup>55</sup>

To examine the influence of distrust on deference, an analysis was conducted separating the Supreme Court from Congress. This analysis also separated the justice from the injustice frame in the questions. As has been noted, this study framed procedural justice as fairness or unfairness. So, for example, people were asked whether decision-making would have a “presence of neutrality/lack of bias” or a “lack of neutrality/presence of bias.”<sup>56</sup> The fairness frame encourages a focus upon the presence of fairness, and the unfairness frame upon the absence of fairness. This allows Congress, a less trusted institution, to be considered separately; combining this focus with a focus on the issue of whether the institution acted unfairly maximized the ability to focus on low trust conditions.

Table 4 presents the results of the analysis outlined. It indicates that respondents evaluating the Supreme Court consistently focused upon whether or not they trusted the Court to consider their concerns. In contrast, when Congress was the focus of evaluation and questions were framed in terms of injustice, people focused upon more directly observable issues—whether Congress followed the law and whether

51. Frank Newport, *Americans Trust Judicial Branch Most, Legislative Least*, GALLUP (Sept. 26, 2012), <http://www.gallup.com/poll/157685/americans-trust-judicial-branch-legislative-least.aspx>.

52. *Id.*

53. Wilks' Lambda = 0.96;  $p < .01$ .

54. Wilks' Lambda = 0.62;  $p < .001$ .

55. Interaction Wilks' Lambda = 0.97,  $p < .05$ .

56. These variations in question framing are drawn from the survey protocol.



its decisions reflected the public's values. These findings reinforce the previously made suggestion that having greater legitimacy allows discretionary actions based upon trust that people's needs are being adequately considered. With lower legitimacy comes less ability to act with discretion, since the public is reacting more strongly to the correspondence between laws, public values and the decisions made.

#### *D. The Value of Discretionary Authority*

As Kahan and others have noted, it is difficult to change people's beliefs, attitudes and values. Hence, to the extent that the ability of legal and political authorities to be effective depends upon their ability to achieve such change, that is potentially problematic. On the other hand, people can defer to authorities without agreeing with them, something that provides an alternative basis for authority in pluralistic societies with divisive political and social differences. This study supports earlier findings that people defer to decisions, at least in part, for procedural reasons, rather than simply because they agree with those decisions.<sup>57</sup> Hence, authorities can gain the ability to exercise their authority by making decisions in ways that people experience as being fair.

These findings further support the argument that people have a broader conception of fairness than is reflected in early discussions of procedural justice. The focus of early studies was upon decision-making.<sup>58</sup> Comparatively, the findings reported here suggest that people focus on not only whether decisions are made in neutral ways that reflect the law, but also on the role that public concerns play in decision-making. In particular, people focus on two issues: (1) whether they believe that their concerns were adequately considered, and (2) whether authorities made decisions consistent with public values.

The issue of consideration is central to trust. When authorities exercise their discretion in making decisions, the public does not know what facts were considered, what arguments were made, or what values were scrutinized. People must infer whether authorities are sin-

57. Tyler, *supra* note 8, at 156-57; see Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, in 30 CRIME & JUSTICE: A REVIEW OF RESEARCH 283-357 (Michael Tonry ed., 2003); Tom R. Tyler, *Public Trust and Confidence in Legal Authorities: What do Majority and Minority Group Members Want from the Law and Legal Authorities?*, 19 BEHAV. SCI. & L. 215, 215-35 (2001).

58. JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE* (1975).

cerely trying to do what is right for the people in the community.<sup>59</sup> Of course, it helps people make such an inference if authorities explain their decisions, detailing how they considered people in the community. Hence, explanation promotes trust. It is important to note that this analysis does not suggest that people should not trust political or legal authorities. Rather, it argues that those authorities cannot assume that people will give them credit for having good will and being concerned about, and responsive to, public concerns. Hence, in addition to making appropriate decisions, decision makers need to provide the community with information about how the decisions were made, so that trust is created and people defer to their decisions. In an era of low trust and confidence in national institutions, authorities cannot take public acceptance for granted. They must make an effort to explain how their efforts address public concerns.

The second issue found to matter is the consistency of decisions with public values. The fact that this issue emerges as distinct from making decisions based upon the law highlights the reality that the public does not view the law as a simple reflection of public values. Again, this does not mean that the decisions made are not such a reflection and are necessarily inconsistent with public views.<sup>60</sup> Rather, it suggests the need to justify decisions through reference to public values. As Kahan argues, decisions need to communicate respect for those values, and it is important that the public believes the actions of authorities are consistent with those values.<sup>61</sup>

Both of these public concerns are linked to issues that go beyond the traditional concern that authorities be neutral, factual and consistent in their application of legal rules (i.e. principled). Rather, these concerns reflect the public's focus on the character and values of the decision makers, i.e. on their sense that decisions are being made by people who are concerned about the people over whom they exercise

59. Trust involves two issues. First people lack information. People are seldom in a position to know what authorities have done. If they indicate that they have explored all sides of the issue the public is not in a position to know specifically what they did. Similarly, the public may lack specialized knowledge through which it can evaluate the actions of authorities. For these reasons authorities need to explain what they have done and why they have done it in ways that can be understood to the public.

60. The issue of discrepancy between law and public values can be treated as an empirical issue. See PAUL H. ROBINSON & JOHN M. DARLEY, *JUSTICE, LIABILITY AND BLAME* (1995).

61. Kahan, *supra* note 1, at 59-66.

authority (not special interests) and who take account of and respect public values (not just their own ideology).<sup>62</sup>

To the extent that authorities, legal or political, value public deference to their decisions, they are more likely to achieve that goal if they address these public concerns when making decisions. And, as has been noted, the ability to gain public deference is central to the effectiveness of legal and political authorities, suggesting that dealing with public concerns when accounting for decisions is advantageous to both Congress and the Supreme Court.

62. Tom R. Tyler & E. Ailan Lind, *A Relational Model of Authority in Groups*, in 25 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 115 (Mark P. Zanna ed., 1992).

Appendix A: Tables

**Table 1.** Factors shaping willingness to defer to decisions.

	Willingness to defer to the decision	
Principled decision making	—	0.12*
Consideration of concerns	—	0.35***
Respect for values	—	0.18**
Favorability of the outcome	0.60***	0.35***
Supreme Court/Congress	-.13*	-0.06
Fairness/unfairness frame	0.06	0.05
Moral/economic issue	-.08	-.05
High/low importance	0.07	0.01
Income	0.02	0.03
Education	0.10*	0.03
Conservatism	-.05	-.02
Total adjusted R.-sq.	39%	66%

**Table 2.** Outcome favorability and deference to decisions.

	Willingness to defer to the decision	
	Outcome favorability	
	Favorable	Unfavorable
Principled decision making	0.12	0.17
Consideration of concerns	0.52***	0.32***
Respect for values	0.12	0.29***
Total adjusted R.-sq.	51%	42%

**Table 3.** Issue involved and deference to decisions.

	Willingness to defer to decisions.			
	Moral		Economic	
	Low	High	Low	High
Principled decision making	0.22	0.04	0.12	0.02
Consideration of concerns	0.36*	0.39***	0.29*	0.39**
Respect for values	-.04	0.35***	0.35*	0.19
Favorable/unfavorable decision	0.46***	0.19*	0.25**	0.39***
Adjusted R.-sq.	60%	78%	60%	59%

**Table 4.** Authority, fairness/unfairness frame and deference to decisions.

	Willingness to defer to decision			
	Supreme Court		Congress	
	Justice frame	Injustice frame	Justice frame	Injustice frame
Principled decision making	0.05	0.20	0.13	0.26**
Consideration of concerns	0.41***	0.76***	0.38**	0.06
Respect for values	0.04	0.25	0.30*	0.45***
Favorable/unfavorable outcome	0.52***	0.27***	0.23**	0.34***
	73%	58%	67%	75%

